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SERVICE DATE - LATE RELEASE JANUARY 31, 2003

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-565 (Sub-No. 11X)

NEW YORK CENTRAL LINES, LLC—ABANDONMENT EXEMPTION—  
IN LAKE COUNTY, OH

STB Docket No. AB-55 (Sub-No. 617X)

CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE  
EXEMPTION— IN LAKE COUNTY, OH

Decided: January 31, 2003

By petition filed on October 15, 2002,<sup>1</sup> New York Central Lines, LLC (NYC) and CSX Transportation, Inc. (CSXT), jointly seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 for NYC to abandon, and for CSXT to discontinue service over, a line of railroad in the Western Region, Great Lakes Division, Chicago Line Subdivision, extending from the former B&O Valuation Station 2535+40 to the end of the track at former Conrail Valuation Station 45+01, between Painesville and Grand River, a distance of 2.56 miles in Lake County, OH. On November 15, 2002, Carmeuse North America filed a letter-protest to the proposed abandonment. On December 6, 2002, CSXT replied. A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was filed by Lake Metroparks. We will grant the exemption, subject to trail use, public use, environmental, and standard employee protective conditions.

BACKGROUND

NYC and CSXT state that there are two rail-served facilities and three potential customers on the line: Morton Salt (Morton), Carmeuse North America (Carmeuse), and Allegheny Niagara (Allegheny) (collectively, the Customers).

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<sup>1</sup> Notice was served and published in the Federal Register on November 4, 2002 (67 FR 67238-39).

Morton operates a rock salt facility at Painesville. NYC and CSXT state that Morton's outbound shipments by rail have been very infrequent and that Morton's rail traffic for the past few years is as follows: 4 cars for the year 2000, 6 cars for the year 2001, and, as of October 15, 2002 (the date the application was filed), 1 car for the year 2002. Most of Morton's outbound shipments are moved by truck.

According to petitioners, Carmeuse recently purchased a facility on the line in Painesville from International Steel Group. This plant, which was shut down in December 2001, was formerly used to produce lime to supply various steel operations. Carmeuse, which recently reopened the facility, has not utilized rail transportation service at all, instead using truck service. Nor was rail service used by the plant's previous ownership. The rail traffic history, according to NYC and CXST, is as follows: 0 cars for the year 2000, 0 cars for the year 2001, and, as of October 15, 2002, 0 cars for the year 2002.

Allegheny produced a lime by-product at the Painesville facility prior to the suspension of operations there. Allegheny shipped 88 cars during the year 2000, 71 cars during the year 2001 and, as of October 15, no cars in the year 2002. The lack of rail traffic for the year 2002 is a direct result of the closure of the facility. NYC and CSXT indicate that they are unaware of whether Carmeuse will allow Allegheny to recommence operations. Allegheny does not have its own facility on the line, and its production of lime by-product was totally dependent upon the operation of the Painesville facility. Allegheny allegedly would have other transportation options available if it is allowed to recommence operations.

CSXT states that the traffic of the Customers does not cover the cost of rail operations. CSXT states that it is incurring an avoidable loss of \$16,642 as a result of the operation of the line. The railroad states that its avoidable loss and return on value will be \$23,029 for the "Forecast Year" October 1, 2002 through September 30, 2003, per 49 CFR 1152.36. The estimated loss for the "Subsidy Year" of January 1, 2003 through December 31, 2003, per 49 CFR 1152.36, will be \$22,871. The railroad's forecast assumes no traffic from Carmeuse or Allegheny.

Carmeuse, by letter protest filed November 15, 2002, states that it did not buy the Painesville facility, but is only leasing it on a month-to-month basis. Carmeuse states that it has advised NYC and CSXT that it is considering shipping coal to the facility by rail car, as well as shipping lime from the facility.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

The petitioners have established that they are incurring losses on the line, and will continue to incur losses until they are permitted to abandon it. At present the line is carrying virtually no traffic. The sparse traffic levels in recent years do not support any prediction of significant traffic levels in the future. Carmeuse's bare assertion that it might use the line in the future is entirely speculative and unsupported by any evidence.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving petitioners from the expense of retaining and maintaining a line that generates very little traffic and allowing CSXT to apply its assets more productively elsewhere on its rail system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed abandonment and discontinuance is not necessary to protect shippers from an abuse of market power because the three potential shippers on the line have made minimal use of rail service and alternative motor carrier service is available. Nevertheless, to ensure that the Customers are informed of our action, we will require NYC and CSXT to serve a copy of this decision and notice on the Customers within 5 days of the service date and certify to us that they have done so. In light of our market power finding, we need not determine whether the proposed abandonment is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

NYC and CSXT have submitted an environmental report with their petition and have notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning

the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on December 13, 2002.

In the EA, SEA recommends to the Board that four conditions be placed on any decision granting abandonment authority. These conditions would provide that NYC and CSXT shall: (1) retain their interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA); (2) notify the National Geodetic Survey 90 days prior to initiation of any salvage operations that may affect two survey markers located near the line in order to plan their relocation; (3) comply with the concerns expressed by the U.S. Department of Interior, Fish and Wildlife Services regarding the summer habitat of the Federally listed endangered Indiana bat that may be within the area by preserving that habitat wherever possible; and (4) comply with the concerns expressed by the U.S. Department of the Interior, Fish and Wildlife Services regarding Federally listed threatened bald eagles that may be nesting within the area by contacting and coordinating with that agency prior to any salvage activities.

No comments on the EA were filed by the January 13, 2003 due date. We will impose the conditions recommended by SEA. Accordingly, based on SEA's recommendation, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

On December 2, 2002, Lake Metroparks filed a request for issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). Lake Metroparks submitted a statement of willingness to assume financial responsibility for the right-of-way, and has acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. On December 6, 2002, NYC and CSXT stated that they are willing to negotiate for interim trail use. Because Lake Metroparks' request complies with the requirements of 49 CFR 1152.29 and NYC and CSXT are willing to enter into trail use negotiations, we will issue a NITU for the subject line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, NYC may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

SEA has indicated in its EA that, if abandonment and salvage of the line does take place, the right-of-way may be suitable for other public use. Lake Metroparks requests imposition of a 180-day

public use condition to allow it to study recreational uses for the right-of-way. Lake Metroparks requests that NYC and CSXT be prohibited from: (1) disposing of the rail corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts and tunnels.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. Lake Metroparks has met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed on the line to be abandoned, commencing from the effective date of this decision, to enable any State or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the right-of-way, NYC must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, NYC is not required to deal exclusively with Lake Metroparks, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in Trails, 2 I.C.C.2d at 608, offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

In its reply to Carmeuse, CSXT suggested that it would be willing to postpone consummating the abandonment for 3 months for the benefit of that shipper. Abandonment authority is permissive. If the railroad wishes to postpone consummation for any reason it may do so. We see no need to impose a condition providing for such a delay.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment by NYC of, and the discontinuance of service by CSXT over, the above-described line subject to the employee protective conditions set forth in Oregon Short Line R. Co.–Abandonment–Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that NYC and CSXT shall: (1) leave intact all of the right-of-way, including bridges, trestles, culverts and tunnels (except track, ties and signal equipment), for a period of 180 days from the effective date of this decision and notice to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) comply with the interim trail use/rail banking procedures set forth below; (3) retain their interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way until completion of the section 106 process of the NHPA; (4) notify the National Geodetic Survey 90 days prior to initiation of any salvage operations that may affect two survey markers located near the line in order to plan their relocation; (5) comply with the concerns expressed by the U.S. Department of Interior, Fish and Wildlife Services regarding the summer habitat of the Federally listed endangered Indiana bat that may be within the area by preserving that habitat wherever possible; and (6) comply with the concerns expressed by the U.S. Department of the Interior, Fish and Wildlife Services regarding Federally listed threatened bald eagles that may be nesting within the area by contacting and coordinating with that agency prior to any salvage activities.

2. NYC and CSXT are directed to serve a copy of this decision and notice on the Customers within 5 days after the service date of this decision and notice and to certify to the Board that they have done so.

3. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, NYC may fully abandon and CSXT may discontinue service over, the line, provided the applicable conditions imposed above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by February 10, 2003, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,100. See 49 CFR 1002.2(f)(25).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

9. Provided no OFA has been received, this exemption will be effective March 2, 2003. Petitions to stay must be filed by February 18, 2003 and petitions to reopen must be filed by February 25, 2003.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), NYC shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by NYC filing of a notice of consummation by January 31, 2004, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober, Vice Chairman Burkes, and Commissioner Morgan.

Vernon A. Williams  
Secretary